

No. 77-1458

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

MAPCO INC. AND THOMAS A. MANHART, PETITIONERS

v.

**JIMMY CARTER, PRESIDENT OF THE
UNITED STATES, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEMPORARY EMERGENCY COURT OF APPEALS**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A-5 to A-37) is not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (Pet. App. A-4) was entered on March 14, 1978. The petition for a writ of certiorari was filed

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on April 12, 1978. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 750, 87 Stat. 27, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).¹

QUESTIONS PRESENTED

1. Whether the temporary domestic crude oil price ceilings imposed by 15 U.S.C. 757 violate the Fifth Amendment.
2. Whether the implementation of those price ceilings, following a period during which certain crude oil prices had been permitted to rise to market levels, violated petitioners' asserted Ninth Amendment right to trust the government.

STATEMENT

In response to a nationwide petroleum shortage, Congress enacted the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 15 U.S.C. 751 *et seq.* Under the authority of that Act, the Federal Energy Office (later the Federal Energy Administration and now part of the Department of Energy) promulgated regulations governing the pricing of domestically produced petroleum. The regulations, which were intended to minimize the inflationary effect of rising world oil prices while at the same time providing incentives for increased domestic production, estab-

¹ See also Section 5(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 15 U.S.C. 754(a), incorporating Section 211(g) of the Economic Stabilization Act by reference.

lished a "two-tier" pricing system for domestic crude oil. The two-tier system provided a price ceiling on "old oil" (oil from properties producing at or less than their 1972 levels) but no such ceiling for "new oil" (oil from properties producing more than their 1972 levels). Under the regulations, the new oil prices were permitted to rise to the world market price level (Pet. App. A-12 to A-14).

With the enactment of the Energy Policy and Conservation Act of 1975, 89 Stat. 871, 941-946, Congress altered this scheme by adding Section 8, 15 U.S.C. 757, to the Allocation Act. Section 757 amended the two-tier system so that the price of new oil would be controlled at a level somewhat below the market price. The two-tier system was retained, but the price of new oil was controlled along with the price of old oil so as to produce a controlled average price per barrel for domestic crude oil (Pet. App. A-18 to A-22).² That average price—and thus the ceiling price of new oil—is subject to upward adjustments in response to inflation and the need to provide incentives for increased production. 15 U.S.C. 757(d). The Act further provides that the mandatory domestic crude oil price controls imposed by Section 757 will expire 40 months

² The average price per barrel was calculated from a baseline price of \$5.25 per barrel for old oil (the current ceiling price) and \$11.28 per barrel for new oil (the prevailing world market price in January 1975). S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 190 (1975). The January 1975 figure was selected in order to counter the effects of the newly imposed oil import fees and the most recent OPEC price increases.

after enactment, *i.e.*, early 1979, and that the authority to impose discretionary controls will expire in September 1981. 15 U.S.C. 760g.

Petitioners, who are engaged in the production and sale of petroleum products, brought this action in the United States District Court for the Northern District of Oklahoma, seeking to enjoin the implementation of the temporary crude oil price ceilings prescribed by 15 U.S.C. 757(a). Petitioners alleged that the price ceiling on new oil confiscated their property without just compensation, in violation of the Fifth Amendment. They also alleged that by imposing a price ceiling on new oil after having previously permitted the price of new oil to rise to the market price in order to encourage domestic production, Congress had violated their Ninth Amendment right to trust the federal government and to rely on its pronouncements (Pet. App. A-6 to A-9).

The district court certified the constitutional questions to the Temporary Emergency Court of Appeals (Pet. App. A-1 to A-3, A-10). That court rejected both constitutional challenges. It held the Fifth Amendment claim unfounded, both because the regulatory scheme set out in Section 757 is limited and temporary and because, under established constitutional doctrine, imposition of a price ceiling does not constitute a taking merely because it renders a potential seller's property less valuable (Pet. App. A-32 to A-34). The court dismissed the Ninth Amendment argument on the ground, *inter alia*, that there was

no representation by the government, implicitly or explicitly, that the price of new oil would be permitted to remain at the world market level indefinitely (Pet. App. A-28).

ARGUMENT

1. Petitioners contend (Pet. 14-21) that Section 757 violates the Fifth Amendment because it authorizes a permanent taking of their property without just compensation.

As this Court has repeatedly held, the imposition of maximum prices is not unconstitutional merely because the value of regulated property is reduced as a consequence of the regulation. *Permian Basin Area Rate Cases*, 390 U.S. 747, 769; *Bowles v. Willingham*, 321 U.S. 503, 517; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601; *Nebbia v. New York*, 291 U.S. 502. The price ceiling imposed on new oil by Section 757 is part of an administrative scheme that calls for "equitable distribution of crude oil * * * at equitable prices" (15 U.S.C. 753(b) (1)(F)), and the "preservation of an economically sound and competitive petroleum industry" (15 U.S.C. 753(b) (1)(D)). The Conference Report on the Allocation Act, H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 26 (1973), noted that the "equitable price" standard imposed by Section 753(b) (1)(F) contemplates price levels that "will permit adequate compensation to assure that private property is not implicitly confiscated by the government." See *Consumers Union of the United States, Inc. v. Sawhill*, 525 F.2d 1068,

1074 (T.E.C.A.) (*en banc*). Since the statute provides for non-confiscatory pricing, the price restraint is within the "broad zone of reasonableness," *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 770, and is not facially unconstitutional.

The price ceiling imposed by Section 757 is further justified because it was implemented as a temporary measure in response to a national emergency. Such temporary legislation designed "to tide over a passing trouble" may be justified even if the same legislation could not be upheld if it were intended as a permanent regulatory measure. *Block v. Hirsh*, 256 U.S. 135, 157; *Cities Service Co. v. Federal Energy Administration*, 529 F.2d 1016, 1028 (T.E.C.A.), certiorari denied, 426 U.S. 947; *Consumers Union of the United States, Inc. v. Sawhill*, *supra*, 525 F.2d at 1080; *Condor Operating Co. v. Sawhill*, 514 F.2d 351, 361-362 (T.E.C.A.), certiorari denied, 421 U.S. 976.

Petitioners further suggest (Pet. 23-24) that, by virtue of the statute and its implementing regulations, they are locked into their prior relationships with their customers, and that this enforced "lock-in" violates their Fifth Amendment rights. The regulation of which petitioners complain, 10 C.F.R. 211.63, requires that all supplier-purchaser relationships in effect on January 1, 1976; shall remain in effect for the duration of the regulatory program, except under limited circumstances. But, as the court of appeals held (Pet. App. A-33), neither the statute nor the regulation deprives petitioners of the right to withdraw from the market. Petitioners are not required

to produce or market crude oil. The statute and regulations merely require that if petitioners elect to produce and market crude oil, they must do so in the manner spelled out in the regulations, which have been designed to preserve and stabilize the nation's crude oil distribution system at a time when there is maximum potential for disorder. *Condor Operating Co. v. Sawhill, supra; Block v. Hirsh, supra.*

2. In support of their novel Ninth Amendment argument, petitioners claim to have hazarded their capital on crude oil exploration and development activities on the expectation, induced by the government, that they would continue to receive world market prices for their "upper-tier" oil.³ They argue (Pet. 24-34) that, because of their expectations, the government should be estopped under the Ninth Amendment from putting a temporary lid on the ceiling price for this oil.

Whatever the legal status of a doctrine that would disable Congress from amending or repealing laws once private persons have relied on the first enactment, there is no foundation for its application here. As the court of appeals held, the government never represented that the price of upper-tier crude oil would remain indefinitely at the world market level set by the OPEC cartel. The fact that the government gave favored treatment to upper-tier oil in order to provide additional economic incentives for

³ "Upper-tier" oil includes new oil and other classes of crude oil that are permitted, under the regulations, to be sold at the higher price level in the two-tier price system.

production does not mean that the government in any way warranted that such favored treatment would always continue, and at OPEC prices. Upper-tier crude oil prices were controlled prior to the passage of Section 757 but were simply permitted to rise during that period to world market levels. *Consumers Union of the United States v. Sawhill, supra*, 525 F.2d at 1077-1079. Moreover, the composite price program implemented under Section 757 retains the two-tier pricing system and continues to give favored treatment to upper-tier oil. *Griffin v. United States*, 537 F.2d 1130, 1139 n.26 (T.E.C.A.). Thus, even if the Ninth Amendment or some other constitutional principle guarantees petitioners a "right to trust the government," that trust has not been breached by the implementation of the temporary domestic crude oil price controls prescribed by Section 757.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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